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HONEYWELL INTERNATIONAL INC.

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA

13 DEBORAH GETZ, et al.,

14 Plaintiffs,

15 v.

16 THE BOEING COMPANY, et al.,

17 Defendants.

Case No. CV 07-06396 CW

**DEFENDANT HONEYWELL
INTERNATIONAL INC.'S NOTICE
OF MOTION AND MOTION TO
STAY DISCOVERY;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

Date: June 19, 2008

Time: 2:00 p.m.

Courtroom: 2

Judge: Hon. Claudia Wilken

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 19, 2008, at 2:00 p.m., or as soon thereafter as the matter may be heard, in the Courtroom of the Honorable Claudia Wilken, United States District Court, Northern District of California, Oakland Division, Courtroom 2, 4th Floor, 1301 Clay Street, 400 South, Oakland, California 94612, Defendant Honeywell International, Inc. (“Honeywell”) will move the Court for an order staying discovery pending the resolution of Honeywell’s Rule 12(b)(1) motion to dismiss.

Honeywell moves this Court to stay all discovery proceedings until Honeywell’s motion to dismiss is adjudicated. A stay of discovery is warranted in this case because: (1) a delay in the commencement of discovery until after Honeywell’s motion to dismiss is decided will avoid unnecessary burden and expense; (2) the motion to dismiss has a high likelihood of success; and (3) the Plaintiffs will not suffer any prejudice if the Court grants the stay.

Honeywell bases its motion on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the pleadings and papers on file herein, and on such other matters as may be presented to the Court at the time of the hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

Defendant Honeywell moves this Court for an order staying discovery pending the resolution of Honeywell’s Rule 12(b)(1) motion to dismiss.

I. INTRODUCTION

The Federal Rules of Civil Procedure grant wide discretion to the courts in the management of discovery. Courts routinely use this discretion to grant a stay of discovery pending the resolution of a motion to dismiss. A stay is warranted in this case because: (1) a delay in commencement of discovery until Honeywell’s motion to dismiss is decided will avoid unnecessary burden and expense; (2) the motion to dismiss has a high likelihood of success; and (3) the Plaintiffs will not suffer any prejudice if the Court grants the stay.

First, a stay of all merits discovery should be ordered until the key threshold issue—whether this Court has jurisdiction over this case or whether Plaintiffs’ complaint must be

1 dismissed as nonjusticiable pursuant to the political question doctrine—is decided. The burden
2 and expense associated with discovery has no counter-balancing benefit until the Court
3 determines if this case must be dismissed as nonjusticiable.

4 Second, the motion to dismiss has a high likelihood of success. This case arises from the
5 crash of a United States Army Special Operations MH-47E Chinook helicopter during a Special
6 Operations Aviation Regiment combat mission in Afghanistan in support of Operation Enduring
7 Freedom. The political question doctrine prohibits courts from interfering in political matters—
8 such as military combat operations—that are within the dominion of another branch of
9 government. Therefore, Honeywell’s motion to dismiss this case as nonjusticiable has a high
10 likelihood of success.

11 Third, Plaintiffs will not be prejudiced by a stay. It is undisputed that the soldiers were
12 involved in a military operation at the time of the unfortunate helicopter crash that is the subject
13 of this litigation. The U.S. Army’s investigation of the crash is still ongoing. Further, the parties
14 have agreed that discovery will proceed for over a year. Thus, a stay of discovery for a few
15 months until the motion to dismiss is decided will not be prejudicial.

16 II. STATEMENT OF FACTS

17 This case arises from the crash of a United States Army Special Operations Aviation
18 Regiment (“SOAR”) MH-47E Chinook helicopter, serial number 92-00472 (the “subject
19 helicopter”), between the late hours of February 17, 2007, and the early morning hours of
20 February 18, 2007, in the Shahjoi District of the Zabul Province in Afghanistan (the “Accident”).
21 The Accident took the lives of eight military personnel who died in the line of duty, as well as
22 injuring fourteen military personnel.

23 The Accident occurred during a SOAR combat mission being conducted in support of
24 Operation Enduring Freedom. At the time of the crash, the subject helicopter “was part of a
25 multi-aircraft flight carrying a quick-reaction force” in support of a Joint Special Operations
26 Command task force mission. (Declaration of Joanna E. Herman in Support of Motion to
27 Dismiss Plaintiffs’ Complaint (“Herman Decl.”) at ¶¶ 3, 6, Exs. 2, 5.) The mission was cancelled
28 and the quick-reaction force was returning to Bagram Air Base from Kandahar. (*Id.*) The subject

1 helicopter was additionally providing CSAR (combat, search and rescue) coverage to several
2 ongoing operations at the time of the Accident. (*Id.* at ¶ 4, Ex. 3.)

3 At the time of the Accident, the subject helicopter was being operated in an active war
4 zone. (*Id.* at ¶ 6, Ex. 5.) The Zabul province is described as a “hotbed for militant supporters of
5 the former Taliban regime.” (*Id.*)

6 Immediately after the Accident, a combat search and rescue operation was launched to
7 secure the site and recover the military personnel. (*Id.* at ¶¶ 6,9, Exs. 5, 8.) After the subject
8 helicopter crashed, the U.S. military destroyed the subject helicopter to prevent possible
9 exploitation of the site by terrorist groups. (*Id.* at ¶ 7, Ex. 6.) Following the Accident, the U.S.
10 Army began an investigation to determine the cause of the crash. The U.S. Army investigation is
11 still ongoing and a final report has not been issued.

12 Plaintiffs sued Honeywell, The Boeing Company, Goodrich Corporation, BF Goodrich
13 Aerospace, Chandler Evans Control Systems and General Electric¹ seeking damages for wrongful
14 death, bodily injuries and loss of consortium based on theories of negligence, strict product
15 liability, and breach of express and implied warranty. Because the nature of the Accident upon
16 which Plaintiffs’ complaint is based involves political questions dedicated to the executive and/or
17 legislative branches, Honeywell has moved for dismissal of the complaint under the political
18 question doctrine.

19 On or about April 17, 2008 Plaintiffs’ counsel, Thomas J. Brandi, sent a letter to counsel
20 for Honeywell, Boeing, and Goodrich Pump and Engine Control Systems requesting the parties to
21 meet and confer on the scheduling of depositions for the custodian of records for each Defendant.
22 Additionally, on April 22, 2008, Plaintiffs served Requests for Admission on each Defendant.
23 Courts in the Ninth Circuit generally treat the filing of a motion to stay discovery as a *de facto*
24 stay of any outstanding discovery requests. *See, Skellerup Indus. v. City of Los Angeles*, 163
25 F.R.D. 598, 600 (C.D. Cal. 1995) (where Defendants sought stay of discovery due to pending
26 motion to dismiss, discovery responses were not due until court ruled on motion to stay); *see also*

27 ¹ Plaintiffs have voluntarily dismissed General Electric. (Docket No. 33)

Vivendi, S.A. v. T-Mobile USA, Inc., No. C06-1524JLR, 2007 U.S. Dist. LEXIS 28710, *3 (W.D. Wash. Apr. 18, 2007) (same); *White v. Am. Tobacco Co.*, 125 F.R.D. 508, 510 (D. Nev. 1989) (same).²

III. DISCOVERY SHOULD BE STAYED UNTIL THE COURT RULES ON HONEYWELL'S MOTION TO DISMISS

A. The Court Has The Power To Stay Discovery Pending Resolution Of The Motion to Dismiss

Rule 26 of the Federal Rules of Civil Procedure grants courts the discretion to stay discovery upon a showing of "good cause." Fed. R. Civ. P. 26(c). "District courts have broad discretion to stay discovery pending the resolution of a potentially dispositive motion, including a motion to dismiss." *In re Netflix Antitrust Litig.*, 506 F. Supp. 2d 308, 321 (N.D. Cal. 2007); *see also Little v. Seattle*, 863 F.2d 681, 685 (9th Cir. 1988); *Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984). It is particularly appropriate for a district court to stay all discovery pending the disposition of a motion to dismiss, if discovery is not required to resolve any factual issues raised in the Rule 12(b) motion. *Jarvis v. Regan*, 833 F.2d 149, 155 (9th Cir. 1987). Honeywell's motion to dismiss raises no disputed factual issues and is therefore proper under Ninth Circuit law.

B. The Burden And Expense Of Discovery Far Outweigh Any Benefit To The Parties While The Motion To Dismiss Is Pending

Rule 1 of the Federal Rules of Civil Procedure requires that the rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. Rule 26 requires courts to control the timing and use of discovery by balancing the burden and expense of discovery against its likely benefit, taking into account the needs of the case and the importance of the discovery in resolving the issues of the case. Fed. R. Civ. P. 26(b)(2)(C)(iii). In this case, until the Court resolves the threshold issue of whether Plaintiffs' claims are justiciable, there is no purpose in burdening the parties with the enormous amount of time and expense of discovery. It is well within a court's discretion to grant stays of discovery

² Honeywell may file a Motion for a Protective Order should Plaintiffs not agree to a stay of the pending discovery requests until the resolution of the motion to stay discovery.

1 pending a motion to dismiss when the dismissal motion raises a question whether a justiciable
 2 case or controversy is before the court. *See e.g., Atlantic States Legal Found., Inc. v. Tyson*
 3 *Foods, Inc.*, 897 F.2d 1128, 1131 (11th Cir. 1990) (granting motion to stay discovery on the
 4 merits until the motion to dismiss was resolved). Thus, while the motion to dismiss is pending,
 5 the burden and expense of discovery outweigh any benefit to Plaintiffs.

6 C. The Motion To Dismiss Has A High Likelihood Of Success

7 There is a high likelihood of Plaintiffs' complaint being dismissed as nonjusticiable under
 8 the political question doctrine. The political question doctrine prohibits courts from interfering in
 9 political matters that are within the dominion of another branch of government. *Banner v. United*
 10 *States*, 303 F. Supp. 2d 1, 9 (D.D.C. 2004), *aff'd* 428 F.3d 303 (D.C. Cir. 2005). Simply put, it is
 11 improper for a court to adjudicate claims that involve the death or injury of individuals during
 12 military operations. *See Rappenecker v. United States*, 509 F. Supp. 1024, 1030 (N.D. Cal. 1980)
 13 ("[C]ourts lack standards with which to judge whether reasonable care was taken to achieve
 14 tactical objectives in combat while minimizing injury and loss of life."); *Bentzlin v. Hughes*
 15 *Aircraft Co.*, 833 F. Supp. 1486, 1497 (C.D. Cal. 1993) ("Plaintiffs' claims necessarily require
 16 inquiry into military strategy....The Marines' deaths occurred during the war. The conduct of
 17 such affairs are constitutionally committed to the Executive Branch....").

18 The political question doctrine arises from two constitutional principles: (1) the
 19 separation of powers among the three coordinate branches of government and (2) the limits of
 20 judicial capabilities. *Banner*, 303 F. Supp. 2d at 9. The political question doctrine prohibits
 21 courts from interfering in political matters that are within the dominion of another branch of
 22 government. *Id.*; *see also Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230
 23 (1986); *Corrie v. Caterpillar, Inc.* 503 F.3d 974, 980 (9th Cir. 2007).

24 The Supreme Court in *Baker* laid out six independent tests for determining whether courts
 25 should defer to the political branches on an issue:

26 [1] a textually demonstrable constitutional commitment of the issue
 27 to a coordinate political department; [2] a lack of judicially
 28 discoverable and manageable standards for resolving it; [3] the
 impossibility of deciding without an initial policy determination of
 a kind clearly for nonjudicial discretion; [4] the impossibility of a

1 court's undertaking independent resolution without expressing lack
 2 of the respect due coordinate branches of government; [5] an
 3 unusual need for unquestioning adherence to a political decision
 4 already made; or [6] the potentiality of embarrassment from
 multifarious pronouncements by various departments on one
 question.

Baker v. Carr, 369 U.S. 186, 217 (1962); *see also Corrie*, 503 F.3d at 980. The presence of *any*
 5 *one of these tests* is sufficient to render a case nonjusticiable. *Banner*, 303 F. Supp. 2d at 9 n.9.

6 The facts of this case dictate that Plaintiffs' claims should be dismissed under *each* of the
 7 six *Baker* tests. The first *Baker* test requires proof of a "textually demonstrable constitutional
 8 commitment of the issue to a coordinate political department." *Baker*, 369 U.S. at 217. Here, the
 9 military operations under which the Accident occurred are textually committed to the executive
 10 and legislative branches by the Constitution and cannot be controlled by the judiciary. U.S.
 11 Const. Art. I, § 8, cls. 11-16 (granting Congress the power to declare war and provide for,
 12 organize, arm, maintain, and govern the military); U.S. Const. Art. II, § 2 (providing that the
 13 President is the Commander-In-Chief of the armed forces); *see also United States v. Stanley*, 483
 14 U.S. 669, 682 (1987) ("[T]he Constitution confers authority over the Army, Navy, and militia
 15 upon the political branches.").

16 Moreover, product liability actions that arise out of military operations have been found
 17 nonjusticiable, because courts cannot resolve issues of causation without inquiring into military
 18 strategy, which is dedicated to the political branches. *Bentzlin*, 833 F. Supp. at 1497; *see also*
 19 *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) ("The complex, subtle, and professional decisions as to
 20 the composition, training, equipping, and control of a military force are essentially professional
 21 military judgments, subject *always* to civilian control of the legislative and executive branches).
 22 (emphasis in original). In *Bentzlin*, a case arising out of the first Gulf War, plaintiffs claimed that
 23 a manufacturing defect in an Air Force missile caused the missile to deviate from its intended
 24 target, thereby striking and killing six U.S. Marines. 833 F. Supp at 1487. The court held that
 25 "proving plaintiffs' case requires inquiry into other possible causes of the friendly fire incident.
 26 No trier of fact can reach the issue of manufacturing defect without eliminating other variables
 27 which necessarily involve political questions." *Id.* at 1497.
 28

As in *Bentzlin*, the circumstances surrounding the crash of the subject helicopter implicate political questions dedicated to the executive and/or legislative branches. First, the subject helicopter was operated by members of the U.S. Army Special Operations Regiment, pursuant to a mission in support of Operation Enduring Freedom. (Herman Decl. at ¶ 7, Ex. 6.) Second, the helicopter was being operated in an active war zone. (*Id.* at ¶ 6, Ex. 5.)³ Third, the subject helicopter was part of a SOAR combat mission “carrying a quick-reaction force” in support of a Joint Special Operations Command task force mission. (*Id.* at ¶ 3, 6, Exs. 2, 5.) The subject helicopter was additionally providing CSAR (combat, search and rescue) coverage to several ongoing operations at the time of the Accident. (*Id.* at ¶ 4, Ex. 3.) The tactics and decisions involved in this mission and the resulting Accident will require the Court to examine the orders of the troops aboard the Chinook, to determine the nature of the combat activity, to consider the day-to-day procedures, training, and operations of the U.S. Army Special Operations Aviation Regiment, and to analyze whether appropriate tactical decisions were made during this mission. Adjudicating the merits of this case would therefore impermissibly encroach on the dominion of the political branches. *Banner*, 303 F. Supp. 2d at 9; *see also Aktepe v. United States*, 105 F.3d 1400, 1403 (11th Cir. 1997) (delicacy of international conflicts are entrusted, by the Constitution, to the political branches of government); *Corrie*, 503 F.3d at 983 (the decision to provide military aid to a foreign country implicates the political question doctrine).

Plaintiffs’ claims also prove to be nonjusticiable under the second independent *Baker* test, because no judicially discoverable and manageable standards exist for resolving the questions raised by the claims. *See Aktepe*, 105 F. 3d at 1404; *Rappenecker*, 509 F. Supp. at 1030. Courts recognize that military decisions result in a complex and subtle balancing of many technical considerations, including the trade-off between safety and combat effectiveness. *Aktepe*, 105 F. 3d at 1404. Plaintiffs’ claims are based on an accident that occurred during a combat military operation. Analyzing and understanding the causes of this Accident would therefore require an

³ The Zabul province is described as a “hotbed for militant supporters of the former Taliban regime.” *Id.*

1 examination of the Army officers' decisions, actions, and reactions during a combat mission, as
2 well as an examination of military decisions more broadly. Whatever military exigencies and
3 requirements intruded into the conduct of this flight are outside of the Court's standards of
4 evaluation. *See DaCosta v. Laird*, 471 F.2d 1146, 1155 (2nd Cir. 1973) (assessment of military
5 operations is nonjusticiable given that courts are "deficient in military knowledge, lacking vital
6 information upon which to assess the nature of battlefield decisions, and sitting thousands of
7 miles from the field of action.").

8 This case is also nonjusticiable under the third independent *Baker* test, because resolution
9 of Plaintiffs' claims would require the Court to make policy decisions generally reserved for
10 military discretion. *Gilligan*, 413 U.S. at 8. Specifically, the Court would need to determine
11 whether the U.S. Army Special Operations Aviation Regiment pilots were sufficiently trained,
12 were sufficiently briefed for their mission, and were adequately rested prior to flight, among other
13 factors. The Court would also be required to evaluate the wisdom of modifications made to the
14 Accident helicopter by the Army and whether those Army modifications caused or contributed to
15 the Accident. Resolution of these issues would encroach upon policy decisions made by the
16 military during a time of war and thereby renders this case nonjusticiable.

17 The remaining *Baker* tests also independently warrant dismissal of this case. The fourth
18 *Baker* test (impossibility of a court undertaking independent resolution without expressing lack of
19 respect to a coordinate branch) is implicated as the Court cannot become enmeshed in second-
20 guessing military decisions made in the heat of battle. The fifth test (an unusual need for
21 unquestioning adherence to a political decision) is also dispositive, because the Court should not
22 question combat decisions made by the U.S. military. Finally, the sixth test (the potentiality of
23 political embarrassment) will be implicated as the Court must necessarily evaluate the decisions
24 of U.S. military strategists and decision makers and scrutinize the circumstances of fatalities and
25 injuries during military combat. *See Aktepe*, 105 F.3d at 1404 ("The interjection of tort law into
26 the realms of foreign policy and military affairs would effectively permit judicial reappraisal of
27 judgments the Constitution has committed to the other branches.").

1 In sum, each of the independent *Baker* tests establishes that Plaintiffs' claims raise
2 nonjusticiable political questions. Thus, Honeywell's motion to dismiss has a high likelihood of
3 success.

4 **D. Plaintiffs Will Not Be Prejudiced By A Stay**

5 Plaintiffs will not be prejudiced by a short stay of discovery pending the resolution of the
6 motion to dismiss. *See In re First Constitution Shareholders Litig.*, 145 F.R.D. 291, 294 (D.
7 Conn. 1991) (granting defendants' motion for a stay of discovery after finding there would be no
8 prejudice to plaintiff, "which will have ample time [if the motion to dismiss is denied] to take
9 discovery on the merits of its claims") (quotation marks omitted). The U.S. Army investigation
10 regarding the cause of this Accident, is still ongoing. Moreover, the very earliest this case will
11 proceed to trial is November 2009 (and likely later), with discovery to be conducted for at least a
12 year. Additionally, despite the fact that Plaintiffs have served discovery requests, the requests are
13 unrelated to the motion to dismiss based on the political question doctrine. Due to the
14 jurisdictional issue before this court, Plaintiffs will not be harmed or prejudiced by a short stay of
15 discovery while the motion to dismiss is resolved.

16 **IV. CONCLUSION**

17 For the foregoing reasons, Honeywell requests that the Court enter an order staying all
18 discovery until a ruling is made on the motion to dismiss filed concurrently herewith.

19 Dated: April 29, 2008

MORRISON & FOERSTER LLP

20 By: /s/ James W. Huston

21 James W. Huston

22 Attorneys for Defendant
23 HONEYWELL INTERNATIONAL INC.
24
25
26
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CERTIFICATE OF SERVICE

I, James W. Huston, hereby certify that on April 29, 2008, I caused to be electronically filed a true and correct copy of the attached **DEFENDANT HONEYWELL INTERNATIONAL INC.'S NOTICE OF MOTION AND MOTION TO STAY DISCOVERY; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** with the Clerk of the Court using CM/ECF, which will send notification that such filing is available for viewing and downloading to the following counsel of record for Plaintiffs:

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I also served the following party by overnight mail [Fed. Rule Civ. Proc. rule 5(b)] by placing a true copy thereof enclosed in a sealed envelope with delivery fees provided for, addressed as follows, for collection by UPS, at 12531 High Bluff Drive, Suite 100, San Diego, California, 92130-2040 in accordance with Morrison & Foerster LLP's ordinary business practices.

I am readily familiar with Morrison & Foerster LLP's practice for collection and processing of correspondence for overnight delivery and know that in the ordinary course of Morrison & Foerster LLP's business practice the document(s) described above will be deposited in a box or other facility regularly maintained by UPS or delivered to an authorized courier or driver authorized by UPS to receive documents on the same date that it (they) is are placed at Morrison & Foerster LLP for collection.

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11 Executed at San Diego, California, on this 29th day of April, 2008.

12 MORRISON & FOERSTER LLP

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